Saad bin Abas & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPLICATION NO K-07-8 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND HAIDAR JJCA
21 NOVEMBER 1998

Criminal Procedure *— Appeal — Right of — Applicants acquitted by magistrate — High Court judge ordered applicants to enter defence before magistrate — Application for leave to appeal to Court of Appeal against High Court's order — Whether High Court's order was final — Whether applicants have to enter defence*

Words and Phrases *— 'Decision' — Courts of Judicature Act 1964 s 50(2)*

Both the applicants were preferred with a charge each for an offence of using criminal force on a female adult under s 354 of the Penal Code (FMS Cap 45). They were jointly tried and the magistrate acquitted and discharged both of them at the end of the case for the prosecution. The learned deputy public prosecutor appealed. The High Court judge allowed the appeal with the order that both the applicants were to enter their defence before the magistrate. They were not satisfied with the decision of the judge and they applied for leave to appeal to the Court of Appeal under s 50(2) of the Courts of Judicature Act 1964. Counsel for the applicants submitted that the words 'decision of the High Court' appearing in s 50(2) must mean that the decision is final and therefore appealable. However, the deputy public prosecutor contended that when a judge of the High Court made the order for the defence to be called after hearing an appeal by the prosecution, that order must be complied with and the proceedings before the learned magistrate must continue in order to hear the defence.

Held, dismissing the application:

(1) If at the end of the prosecution case the court finds that there is a prima facie case against the accused, the court has no other option but to call upon the accused to enter on his defence. The accused will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. There is no room for the accused to avoid the issue of presenting his case; he must comply. Further, there is no authority to support the proposition that an order of a court calling upon the accused to enter on his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact (see pp 134C–D and 135F–G).

(2) The decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. At the stage of making the order, it had

no finality in its intent. This would only happen after a decision had been made at the close of the defence. Only then will there be a decision to 'affect the event of the appeal' (see p 137E); *Au King Chor & Ors v PP* [1985] 1 MLJ 216 distinguished.

(3) In an application made under s 50(2) of the Courts of Judicature Act 1964, the affidavit in support must formulate the questions of law which have arisen in the course of the appeal 'and the determination of which by the High Court has affected the event of the appeal'. In the present case, not one such 'question of law' was formulated. The application could have been summarily dismissed on this ground (see p 138E–F).

[Bahasa Malaysia summary

Kedua-dua pemohon telah dituduh menggunakan kekerasan jenayah ke atas seorang wanita dewasa di bawah s 354 Kanun Keseksaan (NMB Bab 45). Mereka telah dibicarakan bersama dan majistret telah membebaskan mereka di akhir kes pihak pendakwa. Timbalan pendakwa raya telah merayu. Hakim Mahkamah Tinggi telah membenarkan rayuan tersebut dan memerintahkan kedua-dua pemohon memasukkan pembelaan mereka di hadapan majistret. Kedua-dua mereka tidak berpuas hati dengan keputusan hakim tersebut dan telah memohon kebenaran untuk membuat rayuan daripada Mahkamah Rayuan di bawah s 50(2) Akta Mahkamah Kehakiman 1964. Peguam bagi kedua pemohon menghujahkan bahawa perkataan-perkataan 'keputusan Mahkamah Tinggi' seperti di dalam s 50(2) membawa makna keputusan Mahkamah Tinggi adalah muktamad dan oleh itu boleh dirayu. Walau bagaimanapun, timbalan pendakwa raya telah menghujahkan bahawa apabila seorang hakim Mahkamah Tinggi membuat perintah supaya tertuduh dipanggil untuk memberi keterangan selepas mendengar rayuan pihak pendakwa, perintah tersebut hendaklah dipatuhi dan prosiding di hadapan majistret hendaklah disambung semula supaya pembelaan dapat didengar.

Diputuskan, menolak permohonan:

(1) Jika di akhir kes bagi pihak pendakwa mahkamah mendapati wujudnya kes prima facie terhadap tertuduh, mahkamah tidak ada pilihan lain melainkan memanggil tertuduh untuk memasukkan pembelaannya. Ketika itu, tertuduh akan wajib menurut perintah hakim dengan memberi pembelaan dirinya di dalam apa cara sekalipun menurut peruntukan undang-undang. Tiada ruang bagi tertuduh untuk mengelakkan dirinya daripada isu membentangkan kesnya; dia perlu patuh. Tambahan pula, tidak ada autoriti untuk menyokong kenyataan bahawa suatu perintah mahkamah memanggil tertuduh untuk memasukkan pembelaannya boleh digantung bagi membenarkan tertuduh memfailkan rayuan terhadap perintah tersebut atas alasan

keputusan yang dibuat oleh mahkamah adalah salah dari segi fakta dan undang-undang (lihat ms 134C–D dan 135F–G).

(2) Keputusan Mahkamah Tinggi dalam memerintahkan perintah supaya pemohon memasukkan pembelaannya adalah satu perintah yang tidak mempunyai kesan menghapuskan hak-hak mereka secara muktamad. Pada peringkat membuat perintah tersebut, tiada kata akhir bagi niatnya itu. Ini akan hanya berlaku selepas keputusan telah dibuat diakhir kes tertuduh. Hanya selepas itu akan adanya suatu keputusan yang 'memberi kesan terhadap rayuan (lihat ms 137E); *Au King Chor & Ors v PP* [1985] 1 MLJ 216 dibeza.

(3) Di dalam permohonan yang dibuat di bawah s 50(2) Akta Mahkamah Kehakiman 1964, afidavit sokongan hendaklah menyatakan persoalan undang-undang yang telah timbul semasa proses rayuan 'dan penentuan yang mana Mahkamah Tinggi telah memberi kesan terhadap rayuan tersebut'. Di dalam kes ini, tidak ada satu pun 'persoalan undang-undang' telah dinyatakan. Permohonan boleh ditolak atas alasan ini (lihat ms 138E–F).]

Notes

For cases on right of appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 375–432.

Cases referred to

Au King Chor & Ors v PP [1985] 1 MLJ 216 (distd)
Gng Eng Hwoo v R [1954] MLJ 256 (refd)
Lee Pin Seng v PP [1986] 2 MLJ 416 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 50(2), (3A), 66
Criminal Procedure Code (FMS Cap 6) ss 173, 180, 181
Criminal Procedure Code s 233 [India]
Criminal Procedure Code s 296 [Sing]
Evidence Act 1950 s 32
Penal Code (FMS Cap 45) ss 354, 420

Appeal from: Criminal Appeal No 41–160 of 1996 (High Court, Alor Setar)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the applicant.

Zauyah Bee bte Loth Khan (Deputy Public Prosecutor) for the respondent.

Lamin PCA (delivering judgment of the court): This is a joint application by the two applicants for leave to appeal to the Court of Appeal under s 50(2) of the Courts of Judicature Act 1964. On 11 January 1995, each of

the two applicants was preferred with a charge for an offence of using criminal force on a female adult under s 354 of the Penal Code (FMS Cap 45). They were jointly tried and the learned magistrate on 1 September 1996 acquitted and discharged both the applicants at the end of the case for the prosecution. The learned deputy public prosecutor appealed. On 2 April 1997, the appeal was heard and the learned judge of the High Court, Alor Setar, allowed the appeal with the order that both the applicants were to enter their defence before the learned magistrate. They were not satisfied with the decision of the learned judge and so they are now before us praying that they be granted leave to appeal to this court.

Section 50(2) of the Courts of Judicature Act 1964 reads:

> An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the court of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

Mr Karpal submitted that the words 'decision of the High Court' appearing in sub-s (2) must mean that the decision is final and therefore appealable. Puan Zauyah Bee bte Loth Khan, the learned deputy public prosecutor, contended otherwise in that when a judge of the High Court made the order for the defence to be called after hearing an appeal by the prosecution, that order must be complied with and the proceedings before the learned magistrate must, therefore, continue in order to hear the defence. A similar situation arose in the case of *Lee Pin Seng v PP* [1986] 2 MLJ 416. Briefly, the facts of the case were that the applicant (the accused in the sessions court below) and four others were charged in the Sessions Court at Kuala Lumpur with an offence under s 420 of the Penal Code (FMS Cap 45). At the close of the case for the prosecution, the applicant and two others were acquitted. The Public Prosecutor appealed and the High Court ordered the applicant and the two others to enter their defence on the said charge. The applicant thereupon applied to the Federal Court for an order pursuant to s 66 of the Courts of Judicature Act 1964 regarding the provision of s 173(f) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The provision of s 173(f) as it was then reads:

> If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

The Federal Court had this to say (at pp 416–417):

> We agree with the respondent that although our s 173(f) may not be word for word the same as the Singapore s 188; nevertheless, the effect is the same. The application is premature. There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now. Section 66(1) of the Courts of Judicature Act 1964 provides:
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> > 'When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Federal Court may on the application of any party and shall on the application of the Public

A Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.'

In *Cecil Rajah v PP* [1981] 1 MLJ 147 where the facts are quite similar in that the applicant was acquitted by the sessions court at the end of the prosecution B case and on appeal by the respondent, the High Court allowed the appeal and ordered the defence to be called. Thereupon, the applicant applied for certain questions of law of public interest to be reserved for the determination of this court. Concluding the judgment of the court, Suffian LP observed:

'We are of the opinion that in the circumstances of this case the most convenient procedure should be followed, namely that we should uphold C the learned judge's order dismissing the application, so that the case should continue before the president of the sessions court. Only after he has determined the case, after fully considering counsel's submission on the evidence and the law, and, if there is an appeal, after the learned High Court judge has given us the benefit of his views on all the points raised, will it be convenient for us to consider such points of law of public D importance that may be referred to us by him under s 66(1).'

We did not think we should interfere with the decision of the learned judge. The trial should continue before the learned president. We would dismiss the application.

The Federal Court was not concerned with the precise meaning of pertinent E words. It was trying to explain in simplistic terms the whole process in respect of a criminal trial in its own words by saying:

The application is premature. There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now.

F A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. The moment the prosecution has proved its case meaning that the court has decided that there is a case for the accused to G answer, the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right or wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand, if he is acquitted at the end of the case for the prosecution, that means that the court has H decided the fate of the accused and that as far as that court is concerned, the accused is a free man. Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the sessions court judge himself has decided to call for the defence assuming that he has analysed the case in the I way that the High Court judge has done. Only after he has heard the defence can he finally decide the fate of the accused.

For the purpose of conducting criminal trials, magistrates are bound by the rules of procedure as laid down in the CPC, in particular s 173. We quote the present para (h)(1) of s 173 below as it is directly in point in our present discussion. It reads:

> If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court *shall call upon the accused to enter on his defence.* (Emphasis added.)

If at the end of the prosecution case the court finds that there is a prima facie case against the accused, the court has no other option but to call upon the accused to enter on his defence because of the word 'shall'. When a judge is required by a written law to call upon the accused to enter on his defence upon the prosecution having proved its case, the accused, in our view, will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. This supports our earlier proposition that a criminal trial involves both the prosecution case and the defence as being one single process. There is no room for the accused to avoid the issue of presenting his case. He must comply. The present para (h)(1) was brought in by the 1997 amendment. Prior to 1997, the position was no different except that the mandatory provision to call for the defence was contained in the then para (j) which reads:

> If the accused does not plead guilty to the charge as amended or if no amendment is made the accused *shall then be called upon to enter upon his defence and to produce* his evidence, and shall at any time while he is making his defence be allowed to recall and cross-examine any witness present in the Court or its precincts. (Emphasis added.)

The present provision is found in para (j)(2) of the same section and it reads:

> If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

Somewhat similar provisions appear in the Criminal Procedure Code for the court of session in India as found in s 233. Section 233(1) reads:

> Where the accused is not acquitted under s 232, *he shall be called upon to enter on his defence* and adduce any evidence he may have in support thereof. (Emphasis added.)

The duty of the court of session in India to order the accused to enter on his defence as spelt out in s 233(1) is in pari materia with our para (j) of pre-1997 and para (j)(2) of post-1997. *Ratanlal & Dhirajlal on the Code of Criminal Procedure* (14th Ed, 1992) at p 316 have taken the opportunity to comment thus:

> Comment — If the accused is not acquitted under the previous section then the judge calls upon him to enter on his defence. This is not a mere formality but is an essential part of criminal trial. The omission on the part of the judge to do so occasions a failure of justice and is not curable under s 464. The provision in sub-s (1) is mandatory.

Malik's Criminal Trials (2nd Ed) at p 689 also has this to say:

> The provision in sub-s (1) of s 233 Cr PC is undoubtedly a very salutary provision which is mandatory in nature and intended to protect the interests of the accused person. Under this provision, an accused person is entitled to be reminded of his right to adduce evidence in support of his plea. This is an important rule relating to the trial of a sessions case and it is an essential part of criminal trial. The procedure prescribed in this subsection is not an idle formality. Whether the accused would give an answer or not, is the duty of the sessions judge to have put this question to him. Omission to put this question occasions failure of justice. In the absence of full and effective compliance of the mandatory provisions in s 233(1), it cannot be said that the appellant has not been prejudiced in the conduct of his defence. In the circumstance, it is only just and proper that the appellant should be given an opportunity to adduce defence evidence, if any, in support of his plea.
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> Defence — A prisoner on his trial is merely on the defensive and owes no duty to any one but himself, and he cannot be convicted because he had not explained to the court how the offence was committed. The burden lies on the prosecution to prove beyond all reasonable doubt that offence was committed by the accused. Unless there has been prima facie sufficient legal evidence to convict an accused of an offence, he would not be bound to account for his movement at or about the time of a commission of the offence.

If we may repeat from the above quotation thus: 'Unless there has been prima facie sufficient legal evidence to convict an accused of an offence, he would not be bound to account for his movements at or about the time of a commission of the offence.' Conversely, what that means is that when at the end of the case for the prosecution, upon finding by the court that a prima facie case has been made out, the accused will be bound to state his defence. The judge will then expect to hear his evidence so that he can finally decide on his fate.

With regard to criminal trials in the High Court, the position is the same because they are governed by ss 180 and 181 of the CPC. This is so both in pre-1997 and the present situation. Only the wording has been amended but the effect is the same. We have uncovered no other authority from a higher tribunal either here or elsewhere to support the proposition that an order of a court calling upon the accused to enter on his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact. Neither has Mr Karpal been able to assist us. We think it would be preposterous to allow the accused to have his way. As we have said earlier that it is the very nature of an accusation to initiate a criminal trial with a formulation of a charge and logically, it demands a continuous process for both the prosecution and the defence. That was translated into a procedure as enacted in ss 173, 180 and 181 of the CPC.

The next issue under s 50(2) is whether the 'order' or 'decision' to call for the defence is 'a question of law which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.' In the case of *Au King Chor & Ors v PP* [1985] 1 MLJ 216, the Federal Court had to decide on two applications for leave

to appeal to the Federal Court under the old provision of sub-s (3A)(i) of s 50 of the Courts of Judicature Act 1964. For ease of reference, I repeat the full text of sub-s (3A) which was introduced by Act A556 of 1983 and it took effect on 13 May 1983. (Note: The said subsection was however deleted by Act A606 of 1984 which took effect on 1 January 1985.) Subsection (3A) reads:

> (i) Notwithstanding the preceding provisions of this section, either party may apply to the Federal Court for leave to appeal against any other order made by the High Court involving a question of law of public interest that would affect or has affected the course of the trial in the exercise of its original criminal jurisdiction.
>
> (ii) The application for leave referred to in paragraph (i) shall be made to the Federal Court by motion within seven days of the making of the order sought to be appealed against, and in the event leave is granted, the appeal shall proceed to be heard on the motion for leave.

The two applications put before the court the following two questions, namely (a) whether the admission of a documentary evidence under s 32 of the Evidence Act 1950 was right without holding a proper inquiry or trial within a trial and (b) whether the admission of a documentary evidence made either wholly or in part by the accused was right without its makers being called to tender and produce them. There were nine accused who were jointly tried by the High Court below and in the course of the trial two prosecution exhibits namely the two documents were admitted by the learned trial judge. It was the submission of counsel for the defence that the orders of the learned trial judge admitting those documents involved a question of law of public interest affecting the course of the trial and therefore, it was a proper case for leave to appeal to be granted. The applications were however dismissed. The so-called questions of law in *Au King Chor*'s case do appear to be different from the one in the case before us. In the former, the question related to the orders of the judge admitting documentary evidence in the course of a trial whereas in the latter ie the case before us related to the order calling for the defence. Both have one quality in common in that they are incidences occurring in mid-trial. In this regard, I propose to repeat the last few passages from the judgment in *Au King Chor*'s case as follows (at pp 218–219):

> An application for leave to appeal against an order made by the High Court involving a question of law under s 50(3A)(i) is, in that sense, similar to an application for leave for the determination of a question of law under s 66 of the Act. However, there seems to be a distinguishing feature. The clear words of s 50(3A)(i) indicate that fundamentally the order the party seeks to appeal against should not only involve a question of law of public interest but must also be one which would affect or has affected the course of the trial. It entails, in our view, some element of finality in the order such that it would affect or has affected the course of the trial meaning the passage or progress of the proceedings.

Subsection (3A)(i) requires that the question of law of public interest to be determined by the court must be that 'would affect or has affected the course of the trial ... .' In the view of the Federal Court, that would mean:

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> It entails, in our view, some element of finality in the order such that it would affect or affected the course of the trial meaning the passage or progress of the proceedings.

The court proceeded to observe as to the intent or purport of the words 'has affected the course of the trial' appearing in sub-s (3A)(i) and the words 'has
B affected the event of the appeal' appearing in the old s 66 and it had this to say:

> The position under s 66 of the Act is that it requires the question of law determined by the High Court and sought to be referred to the Federal Court for its determination to be one which has affected the event of the appeal and has influenced the result of the appeal and in the sense that there is a finality
C in the decision. Section 50(3A)(i), on the other hand, although it does not contain similar words such as 'has affected the event of the appeal' but contains the words 'would or has affected the course of the trial,' we are nonetheless of the view that they do produce a substantially similar effect.

Those words have the effect of determining the real import of the provision
D and therefore, it does not matter whether the word 'order' or 'decision' is being used.

The present s 50(2) also carries the words 'has affected the event of the appeal' and we, therefore, do not propose to depart from what has just been said above. The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At
E the stage of making the order, certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to 'affect the event of the appeal', meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

F The other point is that the present s 50(2) employs the word 'decision' while s 50(3A)(i) employs the word 'order'. We do not think that they merit any lengthy discussion in view of the context in which they are being used. However, to refresh our memory, we take the liberty to refer to *Wharton's Law Lexicon* (14th Ed) at p 305 for the meaning of the word 'decision' and it gives us the meaning simply as 'a judgment'. For the word 'judgment' at
G p 545, it means 'judicial determination: decision of a court.' It also gives some background history as to the usage of the word and also mentions species of judgments such as 'interlocutory' and 'final'. For our present purpose, we are satisfied and it is sufficient with its meaning as 'judicial determination: decision of a court.' As for the word 'order' at p 718, it gives the meaning as 'mandate, precept, command' while for the word 'precept'
H it gives at p 789 as 'rule authoritatively given; a mandate.' Whitton J in the case of *Gng Eng Hwoo v R* [1954] MLJ 256 attempted to look for the definition of the word 'order' appearing in s 296 of the Singapore Criminal Procedure Code. Section 296 reads:

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> (1) No appeal shall lie from a judgment, sentence or order of a criminal Court except as provided for by this Code or by any other law for the time being in force.
>
> (2) No appeal shall lie from a judgment, sentence or order of a Police Court in any of the cases specified in Schedule 'C'.

The learned judge had this to say at p 257: A

> I have been unable to find any definition of the word 'order' which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those final decisions of a court which affect parties to the proceedings in respect of their person or property. B

Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

Now we may recall s 50(2) of the Courts of Judicature Act 1964, it employs the word 'decision' which is defined in s 3. Early this year, by Amendment Act A1031 of 1998, that definition was amended to read: C

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

So, for the purpose of s 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on D their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

Now, one final and vital point to be shown in an application made under s 50(2) is one without which the application may be dismissed. It is E this. The affidavit in support must formulate the 'questions of law' which have arisen in the course of the appeal 'and the determination of which by the High Court has affected the event of the appeal.' Not one such 'question of law' was formulated. If we had so minded, we could have summarily dismissed the application on this ground.

In conclusion, we seriously think that we should enter a caveat in an F application of this nature and the reason for this, we find in the words of the Federal Court in *Au King Chor*'s case (at p 219) appropriate:

> Assuming for a moment that this is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial court shall have to accede to numerous requests for postponements to enable each party to G appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.

For the above reasons, we are of the view that this is not a fit and proper case for leave to appeal to be granted. This application is therefore dismissed. H

Application dismissed.

Reported by David Lai

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